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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JEREMY KINGSLEY AUSTIN,

Defendant and Appellant.

2d Crim. No. B186959  
(Super. Ct. No. 1200367)  
(Santa Barbara County)

Jeremy Kingsley Austin appeals a judgment after his conviction of four counts of robbery (Pen. Code, § 211),<sup>1</sup> one count of burglary (§ 459), one count of making criminal threats (§ 422) with findings that he acted in concert with two or more persons within an inhabited house (§ 213, subd. (a)(1)(A)) and that he personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b)). We conclude that the trial court properly denied Austin's *Wheeler/Batson* motion, it did not err by granting a continuance, over Austin's objection, to allow Austin's counsel to adequately prepare a defense and it correctly excluded a hearsay statement Austin made to his mother.

We also conclude that the trial court did not err by allowing an accomplice to testify against Austin and by permitting witnesses to make an in court identification of Austin's codefendant. Austin was properly removed from the courtroom during his

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

sentencing hearing because of his disruptive behavior. But the court erred by imposing upper term sentences for robbery and criminal threats by relying on aggravating sentencing factors which were not tried by a jury. The sentence is vacated, and we remand for resentencing. In all other respects we affirm.

## FACTS

Daniel Barreira testified that he sold marijuana. John Mellow was one of his customers. In the evening of February 10 Barreira, Rudy Neidhart, Wizard Schroder and David Abarta went to Barreira's apartment. A short time after they arrived Austin and Jamar Bradford came to the door. They said they were Mellow's friends and they wanted to buy marijuana.

As Austin entered the apartment he pulled out a handgun, grabbed Barreira and held the gun to Barreira's head. Austin and Bradford then ordered the four men into a bedroom and had them pull out their wallets, cell phones and keys. Austin told Barreira that he would shoot Barreira's "kneecaps" if he did not give him the money and drugs. Austin went through the apartment. He found a safe and forced Barreira to open it. Bradford and Austin grabbed the money in the safe.

At trial Barreira, Abarta, Neidhardt and Schroder testified that Austin committed the robberies and they identified him in court.

John Quiles testified that he was a friend of Austin's. He told Austin that he had seen three or four pounds of marijuana in Barreira's apartment. Austin said that he "wanted to go and rob them." Quiles showed Austin where Barreira's apartment was located. Austin had previously given Quiles a gun. He told Quiles that he needed it so he could "use it in the robbery." Quiles gave the gun back to Austin. Quiles testified that he had been "granted immunity" from prosecution.

In the defense case, Jennifer Austin, Austin's mother, was called as a witness. Before she testified the trial court ruled that a statement Austin allegedly made to her at her home on the night of the robbery was inadmissible hearsay. Austin wanted his mother to testify that he told her that he went to her home that night because he needed to pick up clothes for his job the next day. Austin's counsel argued that Austin's

statements were not being used to show the truth of what Austin had said to his mother; he was only "offering them to prove a time." The trial court responded, "But that fact can be proved by the direct testimony of Mrs. Austin, who will come in and say, 'At 10:00 p.m. on February 10th, my son was present.'"

At trial Austin's mother testified that Austin went to her home at 10:00 p.m. on February 10 and he stayed there for half an hour. Her home is 40 to 45 miles from the area where the robberies took place. She said she was able to recall when Austin arrived because she was watching one of her favorite weekly television shows at that time.

#### *The Continuance*

Austin's counsel filed a motion to continue the trial date beyond the 60-day limit in section 1382. He claimed that he needed more time to prepare for trial because he had recently received hundreds of pages of new discovery. Austin opposed the motion. The court granted the continuance.

#### *Motion To Prevent Quiles From Testifying*

Prior to trial Austin's counsel moved to exclude Quiles as a witness for the prosecution. He claimed Austin's right to a fair trial would be compromised if Quiles testified. He argued that Quiles, an accomplice who had been given immunity to testify against Austin, would lie knowing that Austin would not take the stand to contradict him. The trial court denied the motion.

#### *Peremptory Challenges To Prospective Jurors*

During jury selection Austin's counsel claimed that the prosecutor had engaged in the "systematic exclusion of African American jurors" by using peremptory challenges to excuse juror M.S. and juror T.M.

The prosecutor responded that there were valid grounds to exclude juror M.S. He noted that she testified that she had experienced "adversarial situations" between herself and police officers, had been on an "ad hoc" citizens police review committee, and had worked on a community project with the former public defender. He said that juror T.M. testified that her sons were currently being prosecuted on drug charges.

The trial court ruled that the prosecutor was not exercising peremptory challenges "on the basis of racial discrimination" and had valid "non racial reasons" to excuse juror M.S. and juror T.M. It also found that, "it was not apparent . . . that [juror T.M.] was African American."

*Bringing Codefendant Bradford From Custody To Be Identified In Court*

Barreira and Abarta testified that they would be able to identify Bradford if they saw him again. The prosecution arranged to have codefendant Bradford, whose trial had been severed from Austin's case, brought from custody into the courtroom. Bradford was wearing shackles. Barreira and Abarta identified him in court. Austin's counsel did not object and cross-examined both witnesses on their ability to identify the perpetrators.

After Barreira and Abarta had testified, Austin's counsel said, "the thought that occurred to me . . . Mr. Bradford is being paraded before the witnesses before his trial without his lawyer present." The trial court said, "we've already dealt with that with his lawyer." Austin's counsel made no further response.

*The Sentencing Hearing*

At the sentencing hearing Austin repeatedly interrupted the court. He claimed court personnel were going to falsify the record of the proceedings by erasing computer entries. The trial court warned him that he would be removed if he continued to interrupt the proceedings. Austin interrupted the judge after that warning. The trial judge ordered him removed from the courtroom.

The court imposed an aggregate state prison term of 35 years. For robbery it imposed the upper term of nine years, for criminal threats it imposed the upper term of three years. The court, sitting without a jury, relied on several aggravating sentencing factors to justify the upper terms including facts about the way Austin committed the crimes and the force he had used.

## DISCUSSION

### I. *Granting A Continuance To Austin's Trial Counsel Over Austin's Objection*

Austin contends that the trial court erred by granting his counsel's motion to continue the trial date beyond the 60-day limit in section 1382. He claims that because he objected the court should have denied the motion. We disagree.

A defendant in a criminal case has the right to a speedy trial. (*Townsend v. Superior Court* (1975) 15 Cal.3d 774, 784.) This includes the statutory right to be tried within 60 days of the date of the arraignment. (§ 1382, subd. (a)(2).) But where the defendant's counsel needs more time to adequately prepare for trial a court may grant a continuance beyond the 60-day limit. It may do so over the defendant's objection if counsel is acting in the defendant's best interest. (*Townsend*, at p. 784.)

Here Austin's trial counsel said he had received hundreds of pages of recent discovery and he needed more time to "adequately prepare." The trial court found he sought the continuance to protect Austin's "fair trial rights." There was no error. (*Townsend v. Superior Court*, *supra*, 15 Cal.3d at p. 784.)

### II. *The Wheeler/Batson Motion*

Austin contends the prosecutor exercised peremptory challenges to remove all African-Americans from the jury and the trial court erred by not granting his *Wheeler/Batson* motion. (*People v. Wheeler* (1978) 22 Cal.3d 258; *Batson v. Kentucky* (1986) 476 U.S. 79.) We disagree.

"Under *Wheeler* and *Batson*, if a party believes his opponent is improperly using peremptory challenges for a discriminatory purpose, he must raise a timely challenge and make a prima facie case of such discrimination. Once a prima facie case has been shown, the burden shifts to the other party to come forward with an explanation that demonstrates a neutral explanation related to the particular case . . . ." (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.) The prosecutor must articulate valid non-discriminatory reasons for the peremptory challenges. He or she may not rely on "sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People v. Barber* (1988) 200 Cal.App.3d 378, 396.)

Austin claims juror M.S., an African-American, was improperly excused by the prosecutor because she and Austin were of the same race. We disagree. The trial court found the prosecutor had valid non-discriminatory reasons to excuse her.

Juror M.S., a psychotherapist, had worked with Glen Mowrer, the former public defender, in social settings and on a community project. She, Mowrer and others had decided to form an ad hoc "citizens police review board" so there would be "some place where citizens could go to complain other than the police department." She had been in "adversarial positions with law enforcement" and had "gone to the mat against . . . police officers." She had managed a rape crisis center and had confronted police officers who had negative attitudes about the feminists who worked there. The prosecutor properly excused her based on her negative experiences with law enforcement. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1102.)

Austin claims the prosecutor improperly excused juror T.M. But the court found he did not show that juror T.M. "was African American" and there were proper grounds to excuse her. Juror T.M. testified that her sons had recently been charged with drug offenses and they were being represented by the public defender. The prosecutor had valid neutral grounds to excuse her because of the current criminal case against her sons. (*People v. Jurado* (2006) 38 Cal.4th 72, 105.)

### III. *Excluding Austin's Statement To His Mother*

Austin claims the trial court erred by excluding his mother's testimony about a statement he made to her on the night of the robbery. We disagree.

Austin's mother was an alibi witness. She testified that Austin went to her home at 10:00 p.m. the night of the robbery and stayed there for half an hour. Her home was at least 40 miles away from the crime scene. To support her testimony about when he was there Austin wanted his mother to testify about a statement he made to her. That statement was that he went to her house because he needed to pick up clothes for his job the next day. The trial court ruled the statement was being "offered for the truth of the matter" and it was inadmissible hearsay.

Austin has not shown error. Admitting the statement would allow Austin to explain his intentions on the night of the robbery to bolster his alibi defense without testifying. (*People v. Williams* (1957) 151 Cal.App.2d 173, 189 ["reason for denying a defendant the right to introduce . . . his exculpatory declaration is that if he were permitted to do so he would be presenting his testimony . . . without taking the witness stand."].) "Self-serving extrajudicial declarations by criminal defendants are inadmissible to prove the truth of what was said." (*People v. Clay* (1984) 153 Cal.App.3d 433, 457.)

Austin told the court his statement would be introduced to prove when he was at his mother's house, and not for its truth. But the court ruled that even if it was not offered for its truth it was inadmissible because of its remote probative value. Austin's mother testified that she knew exactly when Austin came to her home, while she was watching her favorite television show. The court reasonably found that the out-of-court statement was not necessary to prove a timeline and Austin was using it to circumvent the hearsay rule. (*People v. Clay, supra*, 153 Cal.App.3d at p. 457; *People v. Lancaster* (1957) 148 Cal.App.2d 187, 196.)

Moreover, Austin has not shown that exclusion of his statement was prejudicial. His mother's testimony about his whereabouts on the night of the robbery provided far more direct and significant evidence to support his alibi than his statement to her.

#### IV. *Permitting Quiles To Testify Against Austin*

Austin contends the trial court erred by not excluding Quiles' testimony because he was an immunized accomplice who could "create a story" because he knew Austin would not testify. He claims his Sixth Amendment rights were compromised because he had no effective means to impeach Quiles. We disagree. Our Supreme Court has "rejected the contention that the testimony of an immunized accomplice necessarily is unreliable and subject to exclusion." (*People v. Jenkins* (2000) 22 Cal.4th 900, 1010.) An accomplice may testify against a defendant where the court properly instructs the jury how to evaluate that testimony. (*People v. Frye* (1998) 18 Cal.4th 894, 965-966.)

Here the court correctly advised jurors about the factors they had to consider in weighing Quiles' testimony, including: 1) that Quiles "was an accomplice as a matter of law," 2) that they could not find Austin guilty based on the testimony of an accomplice unless it "is corroborated by other evidence" (CALJIC No. 3.11), 3) that "the evidence of corroboration" had to "be sufficient in itself to establish every element of the crime charged" and 4) that the testimony of an accomplice which "tends to incriminate" the defendant must be "viewed with caution" (CALJIC No. 3.18). (*People v. Frye*, *supra*, 18 Cal.4th at pp. 965-966.)

The jury knew that Quiles had a motive to testify for the prosecution because he had been granted immunity and Austin's counsel had an adequate opportunity to impeach him. He extensively cross-examined Quiles, brought out conflicts between his testimony and what he told the police and told jurors the inconsistencies showed Quiles "lied." Moreover, the prosecution presented independent evidence from other witnesses which established all the elements of the offenses. Because of the strength of that evidence Austin has not shown that any alleged error was prejudicial.

#### *V. Producing Bradford To Be Identified By Witnesses At Trial*

Austin contends that the court erred by allowing the prosecution to bring Bradford, a prisoner in shackles, into the courtroom to be identified by witnesses. He notes that Bradford was a codefendant whose trial had been severed from Austin's and Bradford was not on trial in this case. He claims the identification testimony was unnecessary because the "four victims" . . . identified [Austin] . . . in the courtroom" and the prosecutor used the procedure solely to improperly influence the jury.

But Austin waived this issue by not objecting when Bradford was brought into the courtroom and when Barreira and Abarta testified that they could identify him. (*People v. Medina* (1995) 11 Cal.4th 694, 752.) Moreover, bringing him to court to be identified by witnesses was proper. (*People v. Terry* (1962) 57 Cal.2d 538, 562.) "The production of appellant's alleged co-conspirators, who were not defendants in the case, in the courtroom for purposes of identification by various witnesses as participants in the

several robberies . . . was a proper procedure in the orderly presentation of the People's case." (*Ibid.*)

A major issue at trial was whether the witnesses could identify the perpetrators. Austin's counsel asked prosecution witnesses about their ability to remember details about the robbers. Barreira and Abarta testified that they could identify the second robber if they saw him again. The procedure of bringing Bradford to court tested their observations and their credibility. Had they been unable to identify him it could have planted the seeds of reasonable doubt to Austin's benefit.

Austin notes that the trial court asked whether the identification procedure was "cumulative" because witnesses had identified Bradford "in photo lineups." But the prosecutor said the defense was going to present alibi evidence and he was unsure how strong it would be. His desire to present additional evidence out of an abundance of caution is not misconduct. Moreover, because of the strength of the prosecution's case Austin has not shown prejudicial error.

## VI.

### *Removing Austin From His Sentencing Hearing*

Austin contends the trial court erred by removing him from the courtroom during his sentencing hearing. We disagree.

Defendants are entitled to be present at sentencing. But "[a] disruptive defendant waives his right to be present . . . ." (*People v. Medina, supra*, 11 Cal.4th at p. 738.) Courts do not have to tolerate outbursts by defendants which disrupt the proceedings. (*Ibid.*) Here Austin repeatedly interrupted the court during the sentencing hearing. The court twice asked him not to interrupt, but Austin continued his recalcitrant behavior. The court then warned him that any further interruption would lead to his removal from the courtroom. Austin was properly removed after he ignored this warning. (*Ibid.*)

## VII. *Cunningham*

Austin contends the trial court erred by imposing upper term sentences by relying on aggravating sentencing factors which were not tried by a jury. We agree.

The trial court relied on several aggravating sentencing factors when it imposed the upper terms, including: 1) that Austin had been urged not to commit the robberies by a codefendant, 2) that he used unnecessary force and ignored requests to refrain from using such force, 3) he engaged in "violent conduct which indicates a serious danger to society," 4) he was on probation when he committed the crimes, 5) his "prior performance on probation was unsatisfactory" and 6) his "prior convictions as an adult are of increasing seriousness." But other than the fact of a prior conviction, a jury must decide the remaining aggravating sentencing factors before the court may impose an upper term. (*Cunningham v. California* (2007) 549 U.S. \_\_\_\_, \_\_\_\_ [127 S.Ct. 856].) Because of the trial court's strong reliance on factors which should have been tried by a jury, the sentencing error is prejudicial. (*Ibid.*) The sentence must be vacated. (*Ibid.*)

We have reviewed Austin's remaining contentions and conclude he has not shown any other reversible error.

The sentence is vacated and the matter is remanded for re-sentencing. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Brian E. Hill, Judge  
Superior Court County of Santa Barbara

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